

## REMARKS

Applicants first acknowledge that in their previous Amendment dated December 18, 2008, they inadvertently failed to amend Claim 11 to change the bridging term "comprising" to the more restrictive term "consisting essentially of" (which excludes additional materials that would materially affect the basic and novel characteristics of the claimed compositions). Applicants have corrected this oversight and apologize for any confusion they may have caused. In addition to this correction, Applicants have amended Claim 11 to incorporate the triazoles (but not the imidazoles) specified in Claim 12 (now canceled) and the strobilurins (but not the "strobilurin-like" compounds famoxadone and fenamidone) of Claim 13 (also now canceled) and to incorporate the weight content limitations specified in the specification at page 6, lines 15-25. It should be note with respect to the additives that a minimum content of 0% means that the word "optionally" is superfluous and has been deleted. The total content of all components of the suspension concentrates obviously must be 100%.

As discussed below, Applicants have also amended Claim 11 to indicate more clearly that component (c) can be at least one of the three specified two-component dispersant mixtures. The specification provides support for this amendment at page 4, lines 17-19.

### Rejection under 35 U.S.C. 112

Claims 11-17, 21, and 22 stand rejected under 35 U.S.C. 112, second paragraph, as being indefinite with respect to the weight percent ranges for dispersants (ii) and (iii). Applicants respectfully traverse.

Applicants submit that those skilled in the polymer arts would understand that weight percentages of the monomers in an EO-PO copolymer would refer to the copolymer itself rather than any composition containing the copolymer. Furthermore, the specification at page 5, lines 3-7, makes it clear that the weight percent range for the ethylene oxide component refers only to the block copolymer. Applicants therefore respectfully submit that they have traversed this rejection.

Rejections under 35 U.S.C. 103

A. Schlatter in view of Baur

Claims 11-15, 17, 21, and 22 stand rejected under 35 U.S.C. 103(a) as being unpatentable over United States Published Application 2002/0040044 ("Schlatter") in view of an article by Baur in *J. Agric. Food Chem.*, 47, 753-761 (1999). Applicants respectfully traverse.

Applicants again point out that **Schlatter** discloses pesticidal aqueous suspension concentrates containing **(A)** water-insoluble solid triazole fungicides and **(B)** surfactants that are combinations of (1) tristyrylphenol ethoxylates (or a sulfate or phosphate thereof) with (2) one or more polymers that can be (a) vinylpyrrolidone homopolymers or (b) vinylpyrrolidone/styrene block copolymers or (c) hydrophilic ethylene oxide-propylene oxide block copolymers. E.g., page, paragraphs [0001] through [0005]. Although some of the disclosed components appear to bear some resemblance to some members of Applicants' components (a) and (c), Applicants again note the conspicuous absence from this description of any compounds falling within the narrowly defined alkanolethoxylates of Applicants' component (b). To fill this gap, the Office Action at page 5 again relies on the general disclosure of various additives at paragraphs [0039] to [0045], including a general reference to alcohol ethoxylate adjuvants at paragraph [0045], and on the cited Baur article. Applicants maintain that these teachings are insufficient to lead those skilled in the art to their claimed invention.

Before discussing the relevance of the various additives (including the disclosed alcohol ethoxylate adjuvants) and the relevance of Baur, Applicants address a few points raised in the Office Action about the relationship between the components that make up their claimed invention and the teachings of Schlatter.

First, the Office Action at page 4 correctly states that Applicants' claimed suspension concentrates comprise, *inter alia*, at least one dispersant but then goes on to state that Applicants' claimed suspension concentrates "can comprise two dispersants" (emphasis added). In fact, the dispersant must contain two-component dispersant mixtures. (As discussed above, Claim 11 has been amended in the description of component (c) to reflect this requirement more clearly.) Consequently, any discussion of the teachings of the cited references must take into account that specific two-component dispersant mixtures are required by Applicants.

Second, the Office Action in the paragraph bridging pages 6 and 7 states correctly that Schlatter teaches that the tristyrylphenol ethoxylates it discloses have an average content of from 8 to 40 mol oxyethylene units (see paragraphs [0012] to [0013]) but incorrectly concludes that the range specified in Applicants' claims "overlap or lie inside ranges disclosed by the prior art." In contrast to Schlatter, the tristyrylphenolethoxylates of Applicants' components (c)(i) and (c)(iii) have an average of 50 to 60 oxyethylene units, which clearly does not overlap the range disclosed in the reference. (It should again also be noted that Applicants always use the specified tristyrylphenolethoxylates in combination with other specifically defined dispersants.)

For these reasons alone (particularly the lack of overlap for the tristyrylphenolethoxylates), Applicants submit that those skilled in the art would not be led by Schlatter to their claimed invention, regardless of the disclosure of optional alcohol ethoxylate adjuvants in Schlatter or the teachings of Baur.

With respect to the alcohol ethoxylate adjuvants disclosed in Schlatter, Applicants again point out that the reference provides only a summary discussion of optional additional agents beginning at paragraph [0038] and discloses only a few specific optional agents in the examples. Applicants note in this respect that the present Office Action at page 5 concedes that "Schlatter does not specify types of alcohol ethoxylates that can be utilized" (which obviates any need for Applicants to repeat their previous discussion of this point) but relies on Baur to cure these deficiencies. Applicants maintain that the Baur article would not "cure the deficiencies" of Schlatter as proposed in the Office Action.

As fully discussed in Applicants' previous Amendment, **Baur** describes a model study on the effect of Genapol C-100 – an alkanolethoxylate within the scope of Applicants' component (b) – on the penetration of leaf cuticles by the model compound 3-O- $\alpha$ -D-glucose (also known more simply as "methylglucose"). Methylglucose is typically used as a marker to assess glucose transport (see, for example, *Online Medical Dictionary*, Centre for Cancer Education, University of Newcastle upon Tyne, Dec. 12, 1998; web address <http://cancerweb.ncl.ac.uk/cgi-bin/omd?3-o-methylglucose> (copy previously enclosed)), a purpose not shown in any cited document to have any relationship to pesticide penetration. In response to this point, the present Office Action at page 9 states that the tested compositions never failed to increase penetration and observes that Baur refers to unpublished results carried

out using NAA (i.e., naphthaleneacetic acid), cyanazine, and “more lipophilic compounds such as bifenoxy.” However, a model that assesses glucose transport, no matter how successful, does not necessarily mean that other tests with other substances would produce the same kind of results. Furthermore, Baur does not reveal how the experiments used to obtain the unpublished results were carried out or whether the results are even representative. As noted in Applicants’ previous Amendment, Baur itself indicates that “differences among species exist” (see page 760, right column middle of second paragraph of Conclusions), which suggests a degree of unpredictability that would need to be resolved through further experimentation. Since the active compounds of Applicants’ component (a) are structurally unrelated both to the model compound 3-O- $\alpha$ -D-glucose and to NAA, cyanazine, and bifenoxy, Applicants maintain that those skilled in the art would not be led by the cited references to the very specific, narrowly defined compositions specified in their claims.

Again, the failure of Schlatter to disclose tristyrylphenolethoxylates within the scope of those specified by Applicants, coupled with the absence of any suggestion to use the azoles or strobilurins specified for Applicants’ component (a) or the specific two-component dispersant mixtures of Applicants’ component (c), are consistent with Applicants’ position that Schlatter taken with Baur would not suggest their claimed invention. This is particularly true for Claims 14 to 17, which specify only specific active compounds of component (a).

Applicants submit that any deficiencies in the test data provided in Dr. Baur’s Declarations do not detract from this conclusion. Applicants are fully aware that the experiments reported in the Declarations provide only indirect inferences, as they have acknowledged in their previous Amendment. However, Applicants’ believe that similarly enhanced efficacy would be found for inventive compositions containing all of their specified components, the main advantage of the third component being enhanced stability, a feature not addressed in the references. Applicants believe that their indirectly comparative experiments, even if not dispositive, produced results that are consistent with patentable differences between their claimed invention and the references, particularly in view of the shortcomings of the teachings of the references discussed above.

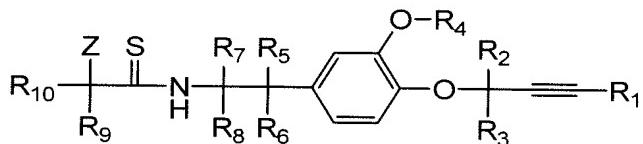
Applicants therefore respectfully submit that their claimed invention is not rendered obvious by Schlatter in view of Baur.

B. Schlatter in view of Baur and Kunz et al

Claim 16 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Schlatter in view of Baur and further in view of WO 02/081437 ("Kunz et al"). Applicants respectfully traverse.

As fully discussed above, Applicants maintain that Schlatter and the Baur article do not alone or together suggest their claimed invention. Applicants also submit that Kunz et al adds nothing that would lead those skilled in the art to their claimed invention.

As fully discussed in Applicants' previous Amendments, Kunz et al discloses microbicidal N-phenethyl thioacetic acid derivatives having the formula



in which **R**<sub>1</sub> is hydrogen, alkyl, cycloalkyl, or optionally substituted aryl; **R**<sub>2</sub> and **R**<sub>3</sub> are each hydrogen or alkyl; **R**<sub>4</sub> is alkyl, alkenyl, or alkynyl; **R**<sub>5</sub>, **R**<sub>6</sub>, **R**<sub>7</sub>, and **R**<sub>8</sub> are each hydrogen or alkyl; **R**<sub>9</sub> is hydrogen or optionally substituted alkyl, alkenyl, or alkynyl; **R**<sub>10</sub> is optionally substituted aryl or heteroaryl; and **Z** is hydroxyl, optionally substituted aryloxy, alkoxy, alkenyloxy, alkynyloxy, arylthio, alkylthio, alkenylthio, alkynylthio, alkylsulfinyl, alkenylsulfinyl, alkynylsulfinyl, alkylsulfonyl, alkenylsulfonyl, or alkynylsulfonyl, or any of three types of acyl groups. E.g., page 1. Applicants again point out that such compounds are not among the types of active compounds specified by Applicants. Since Applicants have cured their inadvertent failure to replace the open bridging term "comprising" in Claim 11 with the more restrictive term "consisting essentially of," Applicants again submit that nothing in Kunz et al would lead those skilled in the art to select only the particular components specified by Applicants in the absence of other components – such as the N-phenethyl thioacetic component required by the reference – that would affect the basic and novel characteristics of the claimed compositions. Applicants note in this regard that the mere disclosure of individual components within a group of references does not suggest their combination even under the liberal standard for obviousness set out in *KSR International v. Teleflex*, 82 U.S.P.Q.2d 1385, 550 U.S. 398 (2007). See in particular Judge Rader's warning against tossing "metaphorical darts at a board filled with combinatorial prior art possibilities" in *In re Kubin*, 90 U.S.P.Q.2d 1417, 561

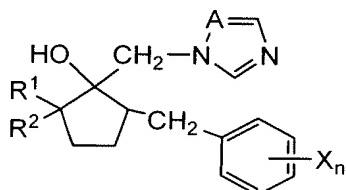
F.3d 1351 (Fed. Cir. 2009), citing *In re O'Farrell*, 7 U.S.P.Q.2d 1673, 853 F.2d 894 (Fed. Cir. 1988). Applicants therefore submit that Kunz et al would not lead those skilled in the art from Schlatter to their claimed invention.

Applicants therefore respectfully submit that their claimed invention is not rendered obvious by Schlatter in view of Bauer and Kunz et al.

C. Grayson in view of Schlatter

Claims 11-15, 17, 21, and 22 stand rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent 5,393,770 ("Grayson") in view of Schlatter. Applicants respectfully traverse.

Grayson discloses fungicidal compositions containing (1) compounds of the formula



in which R<sup>1</sup> and R<sup>2</sup> are independently hydrogen or alkyl, A is N or CH<sub>2</sub>, X is halogen, alkyl, or phenyl, and n is 0, 1, or 2; and (2) an alkoxyate of an aliphatic alcohol. E.g., column 1, lines 34-53. Among the disclosed alcohol alkoxylates (preferred members of which are described generally at column 2, lines 11-40) can be found Genapol C-100 (see column 6, lines 5-10) and others. However, as acknowledged in the Office Action at page 14, Grayson does not disclose compounds within the meaning of Applicants' components (a) or (c). Instead, the Office Action relies on the teachings of Schlatter to bridge the gap between Grayson and Applicants' claimed invention.

As with Kunz et al (discussed above), the compounds represented by the above formula are not among the types of active compounds specified by Applicants. Since the restrictive bridging term "consisting essentially of" effectively excludes such compounds from their claims, Applicants submit that Grayson would not lead those skilled in the art from to their claimed invention, regardless of what is taught by Schlatter. This conclusion is bolstered by the failure of Schlatter to disclose tristyrylphenolethoxylates within the scope of those specified by Applicants and the absence of any suggestion to use the azoles or strobilurins specified for Applicants'

component (a) or the specific two-component dispersant mixtures of Applicants' component (c). This is particularly true for Claims 14 to 17, which specify only specific active compounds of component (a).

Applicants therefore respectfully submit that their claimed invention is not rendered obvious by Grayson in view of Schlatter.

D. Grayson in view of Schlatter and Kunz et al

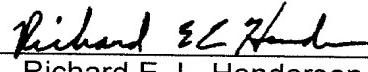
Claim 16 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Grayson in view of Schlatter and further in view of Kunz et al. Applicants respectfully traverse.

As discussed above, Grayson discloses fungicidal compositions that contain compounds that are not within the scope of Applicants' claims in conjunction with alcohol alkoxylates that include, inter alia, Genapol C-100. Applicants maintain for reasons similar to those discussed immediately above with respect to the rejections discussed above, particularly since Schlatter fails to disclose tristyrylphenolethoxylates within the scope of those specified by Applicants and fails to suggest the use the azoles or strobilurins specified for Applicants' component (a) or the specific two-component dispersant mixtures of Applicants' component (c).

Applicants therefore respectfully submit that their claimed invention is not rendered obvious by Grayson in view of Schlatter and Kunz et al.

In view of the preceding amendments and remarks, allowance of the claims is respectfully requested.

Respectfully submitted,

By   
Richard E. L. Henderson  
Attorney for Applicants  
Reg. No. 31,619

Bayer CropScience LP  
2 T.W. Alexander Drive  
Research Triangle Park, NC 27709  
Ph.: (919) 549-2183  
Fax: (919) 549-3994  
Q:patents/prosecution documents/cs8755/8755 amendment 6-24-09